

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: Case No. 08-14106 (reg)
SILVIA NUER, New York, New York
Debtor. April 19, 2010

CHAP 7 MATTER - TRANSCRIPT RE TELEPHONE CONFERENCE RE
JAY TEITELBAUM'S REQUEST FOR JUDICIAL RELIEF; AND THE UST'S
REQUEST FOR RULINGS ON ATTORNEY-CLIENT PRIVILEGE.

BEFORE THE HONORABLE ROBERT E. GERBER

UNITED STATES BANKRUPTCY JUDGE

A P P E A R A N C E S :

For Debtor LINDA M. TIRELLI, ESQ.
202 Mamaroneck Avenue, 3rd Fl.
White Plains, New York 10601
(914) 946-0860; (914) 946-0870

For J.P. Morgan: JAY TEITELBAUM, ESQ.
Teitelbaum & Baskin, LLP
3 Barker Avenue, 3rd Floor
White Plains, New York 10601-1509
(914) 437-7670; (914) 437-7672 fax

For the UST Office: GREG MICHAEL ZIPES, ESQ.
33 Whitehall Street
New York, New York 10004-2112
(212) 510-0500

April CHARNEY, ESQ.
Jacksonville Legal Aid

Transcription Service: A-1 Transcripts
A1@Court-Transcripts.net

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1 THE COURT: Who do I have on the phone please?

2 MS. TIRELLI: Good morning, Your Honor. It's Linda
3 Tirelli.

4 THE COURT: All right, Ms. Tirelli.

5 MR. TEITELBAUM: And you have Jay Teitelbaum, Your
6 Honor.

7 THE COURT: All right, Mr. Teitelbaum.

8 MR. ZIPES: Greg Zipes, Your Honor.

9 THE COURT: Okay.

10 MS. CHARNEY: April Charney, Jacksonville Legal Aid.

11 THE COURT: All right. Fair enough. All right,
12 folks, as far as I understand all of the letters that I read in
13 preparation for this call, we have two principle agenda items;
14 one being Mr. Teitelbaum's request for judicial relief as a
15 consequence of the conduct of the recent Reyes (ph.) deposition
16 and the second being Mr. Zipes' request for rulings on attorney-
17 client privilege.

18 As I said, I have read all of that stuff you laid on
19 me and while I haven't read every word of that transcript, I
20 have read enough to have a fair degree of consternation about
21 the way that that deposition went. While I have problems with
22 both sides, I particularly have problems with the way you, Ms.
23 Charney, who are a new face to me conducted that deposition.

24 I have the transcript of the deposition. I don't have
25 -- nobody gave me a copy of any transcript that might exist of

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1 our last conference call, but unless I am missing something I
2 thought the purpose of the Reyes deposition was to authenticate
3 a number of documents and the scope of inquiry that took place
4 in my view was breathtaking and very surprising to me.

5 Now I have stated before and I think somewhere in one
6 of the many submissions Mr. Teitelbaum acknowledged, that in
7 general an attorney's perceptions of relevance are not a basis
8 for directions not to answer in a deposition. But this
9 deposition took place in the context of rulings by me prior to
10 the deposition which had both a context as to the purpose of the
11 deposition and standards as to relevance.

12 Now there appears to be a major disconnect here. I
13 don't like speaking objections but I think that while there's
14 some blame to go around, perhaps more than a little blame to go
15 around to just about everyone other than Mr. Zipes, I've got
16 major problems, Ms. Charney, with the way you conducted this
17 deposition.

18 Now on the matter of the privilege concerns that Mr.
19 Zipes has, Mr. Zipes, I will hear what you have to say but it
20 appears to me that if a person is a bona fide agent of a person
21 who is subject -- who has a privilege entitlement, the fact that
22 the agent is communicating in an otherwise privileged
23 communication would not disable the owner of the privilege from
24 invoking it.

25 But with that said, I did not see enough to give me

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1 comfort that any communications that were reflected in those
2 notes were for either they -- were from the lawyer to the
3 client, providing legal advice or were facts provided to the
4 lawyer for the -- with the reasonable expectation and purpose
5 that they were to secure legal advice and there are many
6 exceptions to the attorney-client privilege such as conveying
7 ministerial information such as conveying information obtained
8 from third parties or conveying information that's for other
9 than the purposes of securing legal advice in that call. And
10 therefore, I am not of a mind to fully subscribe to either of
11 your positions and instead believe that I need to review the
12 documents in camera and if necessary, to get affidavits
13 submitted to me concerning the specifics which would go --
14 describe the purpose of the communication, the relationship
15 between the parties, the purpose of the call and all of the
16 things that would provide surrounding context for the invocation
17 of the privilege. The fact that an agent for a client is
18 conveying -- is speaking to the lawyer or passing -- had some
19 communication with the lawyer does not by itself make it
20 privileged.

21 So those are my tentatives. I will hear first from
22 you, Mr. Teitelbaum.

23 MR. TEITELBAUM: Your Honor, would you like to hear
24 first on our March 31 letter and the conduct of the examination
25 or would you like Ms. Charney to respond? I think, Your Honor,

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1 frankly put your finger on the concerns that we had. I don't
2 want to belabor it. You have said you've read the submission
3 and read the transcripts. I was literally going to point out
4 that Mr. Zipes conducted the examination, finished in about --
5 just about under an hour. The witness did everything that he
6 was -- answered every question within the scope of the March 17
7 and 18th rulings that was asked of him.

8 Ms. Charney conducted the examination and not only
9 covered the same ground but then went well beyond the scope and
10 by way of example just repeatedly asked the same question 18
11 times or 15 times with respect to the assignment and the
12 existence of an assignment other than the assignment of blank.
13 With respect to whether the mortgage that is at issue here was
14 actually in the trust, when in point of fact, Your Honor, just
15 by way of example, the Debtor's amended pleading filed in this
16 case, the amended objection in August of '09 attaches in Exhibit
17 C and the Debtor herself -- I'm sorry, Ms. Tirelli, counsel for
18 the Debtor, alleged that, just to quote, "Attached is Exhibit C
19 to show the Court that the Debtor's mortgage loan is included in
20 the trust."

21 So there was 45 minutes of questioning about
22 something, Your Honor, that the Debtor has acknowledged already
23 in the pleadings to demonstrate -- to try to support their
24 argument that in point of fact in 2008 when the Garvis and
25 Walter assignments were executed, their argument that those

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1 documents would fall because Chase did not own the mortgage and
2 loan. It was property of the trust.

3 So we spent an incredible amount of time covering
4 things that are not at issue. Another perfect example were
5 questions relating to whether or not the trust could accept
6 loans which were in default when in point of fact the Debtor's
7 produced to us letters at the closing of the mortgage in January
8 of '06, signed or initialed by the Debtor that reflected the
9 first payment was not due until March 1, 2006 with a 15 day
10 grace period and the mortgage went into the trust by the
11 testimony on March 7. So there was no issue of a default or any
12 of this that was questioned over several pages of the
13 transcript, Your Honor.

14 And, you know, as we said, this witness was produced
15 as custodian of records. He testified to those records and
16 without any basis, Ms. Charney said well let's just assume that
17 none of your records can be relied upon; what other documents do
18 you have. And that was almost essentially, Your Honor, the end
19 of the deposition at point.

20 So we do believe that Mr. Reyes has fully testified,
21 fully complied. We believe we acted appropriately under 7030(c)
22 and (d) in directing the witness not to answer questions based
23 on Your Honor's order and suspending the depo and then
24 immediately filing this letter with the Court seeking this
25 telephonic conference. I am not going to belabor the issues,

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1 Your Honor, on that.

2 THE COURT: All right. Then speak to the privileged
3 aspect please, Mr. Teitelbaum.

4 MR. TEITELBAUM: Yes, Your Honor. On the issue of
5 privilege, we agree with the initial assessment, Your Honor,
6 that the fact that transactions -- communications go through an
7 agent, under the law including Covell (ph.) in the Second
8 Circuit, hold that those do not waive the privilege.

9 Part of the problem and the confusion that some of the
10 documents -- and I tried to explain this to Mr. Zipes and it's
11 all obvious difficult -- is when you look at the LPS (ph.)
12 documents that were produced, these notes, you have to actually
13 read them from the back forward and from the bottom up because
14 they're essentially in reverse email chain or it's not email but
15 that's how you would have to read them. And so if you read them
16 from the front forward you say well why is this communication,
17 originated by Fidelity or an LPS person apparently to no one,
18 privileged? The answer is that two or three entries prior to
19 that, there was a communication from the Baum firm setting forth
20 this is what's going on in the case. This is what we need to
21 do. This is what we need. And then the protocol that the LPS
22 person resubmits that information in a follow-up input so that
23 someone from Chase or WaMu can see it more readily from LPS.

24 So the things that we redacted, Your Honor, and we
25 have no issue producing them to the Court which we would like to

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1 try avoid burdening the Court and maybe Mr. Zipes and I can sit
2 down and -- if we can do it in confidence, I could walk him
3 through some examples of that and alleviate the issue, but I
4 just want to make sure that by doing so we don't waive the issue
5 of privilege. But as what happens with these kinds of things,
6 you unfortunately need to see the whole communication to
7 appreciate why we did what we did.

8 THE COURT: All right. Well I haven't given Mr. Zipes
9 a chance to be heard yet and of course I will, but I'd give you
10 a non-waiver protection in the blink of an eye if a lawyer
11 communicates to the client something that's going on in the
12 case, that of course is not privileged. I didn't understand you
13 to be contending that it was but it is, of course, a poster
14 child for the example that I gave of -- the articulation of the
15 law that I gave that some communications between lawyers and
16 clients are privileged and others are not.

17 Certainly Mr. Zipes is entitled to be heard both on
18 the underlying legal principles and on the future approach but
19 my tentative would be that anything where you can satisfy Mr.
20 Zipes you can provide him with information without a waiver and
21 then if Mr. Zipes wants me to rule on any issues where you and
22 he have agreed to disagree, he's entitled to that.

23 And in terms of the total burdens that this case has
24 been, this is like a sand -- a grain of sand on the beach. So
25 let me hear next from Debtor's counsel and then we won't forget

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1 about Mr. Zipes before we're done. I do have to caution you
2 that we have a relatively limited amount of time to deal with
3 all of this stuff today. I have major hearings in Cantura (ph.)
4 which have both a full trial and a major litigated matter
5 thereafter. So we've got to stay on schedule today. All right.

6 MS. CHARNEY: Judge, this is April Charney and I
7 appreciate the Court's opportunity to make my presentation. The
8 purpose of -- as I see my role on behalf of the Debtor in this
9 case is to show the Court that there was fraud committed on the
10 Court. And in the course of that fraud, it harmed this Debtor,
11 Ms. Nuer.

12 The way that the fraud was committed as alleged by the
13 US Trustee and by Ms. Nuer is that the entities that presented
14 the documents to the Court, the instruments, the assignments,
15 were fully aware at the time that these documents were filed
16 that they did not represent truth. In other words, these
17 assignments were housekeeping efforts to try to fix assignments
18 and transactions that were supposed to occur pursuant to a
19 pooling and servicing agreement that were never performed or
20 accomplished.

21 So the fact that at the time Linda Tirelli,
22 representing Ms. Nuer, filed a pleading with the Court
23 evidencing a list of loans, was because the discovery was not
24 complete enough at that time to understand that that list of
25 loans was strictly a hearsay document without any foundation.

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1 The lack of foundation is presented by the fact and that's
2 perhaps why the Court thought I was going far afield in the
3 deposition because without understanding the document
4 requirements under the pooling and servicing agreement which
5 incorporate both securitization provisions and also a REMIC or a
6 real estate mortgage investment conduit tax shelter provision
7 because all of these securitized trusts are passive tax through
8 trusts, that these -- there are specific documentation
9 limitations. The only way these trusts can own their documents
10 is when they execute documents in a timely fashion and transfer
11 interest in property through a series of bankruptcy remote
12 vehicles within a very short timeframe.

13 And the effort for this witness was to show that this
14 transaction requirement under its own pooling and servicing
15 agreement in fact did not occur. Without being able to tie in
16 both the requirements of the Uniform Commercial Code, layered as
17 it is with REMIC limitations imposed by the IRS and put in
18 specific detail in the pooling and servicing agreement, it is
19 very difficult to try to show the Court that these parties were
20 fully aware at the time that they filed these documents that
21 they knew that they didn't -- that the Trust did not own this
22 loan.

23 And although I see this as a Legal Aid lawyer in every
24 case that I am involved in, to tie it specifically to the Nuer
25 loan really requires the opportunity for the Trustee and for Ms.

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1 Nuer to be able to inquire of these very specialized witnesses
2 how they operate under their own pooling and servicing
3 agreement. And so what we end up with is a hearsay list of
4 loans that wasn't ever filed with the pooling and servicing
5 agreement. What we're left with is very loose ends as to when
6 this loan was actually placed into the trust because the
7 documents say one thing after the fact, after a default. We
8 have written documents or instruments showing a transfer but the
9 pooling and servicing agreement says that this transfer had to
10 occur at a very specific time, at a time when the loan was first
11 performing within 120 days of when this '06 trust was
12 established (indiscernible) --

13 THE COURT: Stop, Ms. Charney.

14 MS. CHARNEY: -- after the (indiscernible).

15 THE COURT: Stop. Enough. I let you go on and on and
16 on without interrupting but at this point, you've taxed my
17 patience. You've pushed me too far. Did you read the
18 transcript of the last hearing I had and my rulings and of the
19 arguments that were made to me?

20 MS. CHARNEY: Yes, Judge and I have read every
21 transcript in this case that I could get my hand on. My
22 impression was that there was --

23 THE COURT: Please answer my questions and don't
24 answer more. And then I will give you another chance to be
25 heard.

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1 MS. CHARNEY: Yes, Your Honor, I have read the
2 transcripts.

3 THE COURT: All right. Now wasn't this guy supposed
4 to be produced as a document custodian?

5 MS. CHARNEY: He was -- correct.

6 THE COURT: And the purpose of deposing a document
7 custodian is to authenticate documents; isn't it?

8 MS. CHARNEY: Judge, he was also produced as a signer
9 of a document.

10 THE COURT: And from that you conclude that you can
11 inquire as to things other than what he signed and what he
12 thought he was signing and why he was signing it?

13 MS. CHARNEY: Judge, it's the -- he testified that
14 this was his department and he was in control of the flow and
15 control of documents involved in this loan and this securitized
16 trust. And he actually executed one of the assignments at
17 issue. So the question was where did his authority come from to
18 execute that assignment? And if it came under the pooling and
19 servicing agreement, show me where that power came from.

20 MR. TEITELBAUM: Your Honor, Jay Teitelbaum, quickly.

21 THE COURT: No, Mr. Teitelbaum. It's not your turn.

22 MR. TEITELBAUM: Okay. Thank you.

23 THE COURT: You may continue, Ms. Charney, but I am
24 not particularly interested in your perceptions of what is
25 required for tax deductions or your perceptions of what is

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1 required to achieve securitizations.

2 MS. CHARNEY: I understand, Judge, but one element
3 that I think is necessary for this case is to bring in the
4 pooling and servicing agreement because that's the only way that
5 this trust can own the loan and that's the only way to show that
6 there wasn't fraud committed on the Court.

7 THE COURT: Well do you have a copy of the pooling and
8 servicing agreement?

9 MS. CHARNEY: We do and it was actually part of the
10 exhibits that were given to the witness and to Mr. Teitelbaum
11 prior to the deposition. I was referring to an exhibit of the
12 deposition. Also, the master loan purchase agreement was part
13 of the exhibits given to the witness and I didn't even get to be
14 able to question the witness as to the loan purchase agreement
15 because there should have been transfer receipts and certificate
16 receipts if these -- if this loan was actually transferred
17 through the bankruptcy remote vehicles, there should be transfer
18 receipts for each transfer. And Ms. Nuer's entitled to discover
19 that and that is where I was just shut down.

20 And then with all due respect, Judge, I am only
21 looking to get the document trail that should be under their own
22 pooling and servicing agreement.

23 THE COURT: And were you shut down on a question like,
24 "Did you ever see a document," and then you fill in the blank?
25 Because I read the -- I have been doing this 40 years, Ms.

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1 Charney, and I have rarely, if ever, seen a deposition that was
2 as argumentative and as ineptly conducted as the one you took,
3 with all due respect.

4 MS. CHARNEY: Judge, I appreciate that and I was -- I
5 am not used to -- first of all, it was via Skype. And second of
6 all, you know, with all due respect to Mr. Teitelbaum, he was
7 exceptionally disruptive. If you actually pull out my
8 participation, most of my deposition time was occupied by Mr.
9 Teitelbaum. And so it was exceptionally hard even to keep a
10 chain of thought, much less remember that I was trying to tie
11 the Nuer loan into a pooling and servicing agreement that's 700
12 pages long and a master loan purchase agreement that's probably
13 another 60 pages long.

14 And although the Judge -- I appreciate, but the
15 agreement language is part of the pool -- it's probably 60 pages
16 in a pooling and servicing agreement. It very specifically says
17 that the loan has to go this place within 120 days and then to a
18 depositor, then into a sponsor and then to the trustee. And
19 what you have is a after the fact document created in
20 anticipation of litigation and then the only way Ms. Nuer or the
21 trustee is going to be able to show that to the Court is by
22 documenting the failures under the pooling and servicing
23 agreement and a master loan purchase agreement.

24 And we have, even for the deposition that's set for
25 tomorrow with another signer, we have to be able to show the

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1 failure -- what we call a failure to launch the original loan
2 into the trust through the bankruptcy remote vehicles. And it's
3 not so much that they didn't create an after the fact document,
4 we all know that that happened, the question is was that fraud
5 on the Court? And I have to be able to show for Ms. Nuer that
6 they were fully aware that they didn't own this loan under the
7 trust because it's own trust agreement made them fully aware.

8 And it's a document issue of whether they were fully
9 aware, not what was in a corporation's mind -- in my mind
10 anyway. And so I am looking for the trail to show me the
11 missing documents, the missing links, because there are so many
12 missing links that they had to be fully aware when they filed
13 these documents with the Court, that they knew the trusts
14 couldn't possibly own this loan.

15 And I realize that up until now, the pooling and
16 servicing agreement has been a minor player in this case but I
17 hope and the reason that I traveled all of the way from
18 Jacksonville to participate in this New York bankruptcy is to
19 make sure that there was careful attention paid to the fact that
20 the only engine that runs this trust is its own pooling and
21 servicing agreement.

22 THE COURT: All right. Ms. Tirelli, do you have
23 anything to add?

24 MS. TIRELLI: Your Honor, my concerns (indiscernible).

25 THE COURT: Before you begin, Ms. Tirelli --

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1 MS. TIRELLI: Yes?

2 THE COURT: Before you begin, I read your supplemental
3 letter and I had problems different in character but material
4 problems with your letter, too which seemed to be focusing on
5 everything except the issues and how could you possibly ask me
6 to appoint a special master consistent with what the bankruptcy
7 -- Federal Rule of Bankruptcy Procedure provide?

8 MS. TIRELLI: Well, Your Honor, the problem is at the
9 end of this deposition, I was hoping to not have to get into
10 this but Mr. Teitelbaum did stand over me with his hands in my
11 face and at one point told me to get the hell out of his office.
12 It's a violent gesture.

13 I am trying to come up with suggestions and ways that
14 perhaps we can continue to proceed in this case but I have some
15 safety concerns. And I suggested to Mr. Teitelbaum that we hold
16 the future depositions on a neutral ground and not in his office
17 and then perhaps we could have another party present who can,
18 you know, stand over this and what not. Your Honor, I don't
19 know what else to suggest.

20 THE COURT: Mr. Zipes, can you bring some order to
21 this chaos, please?

22 MR. ZIPES: Judge, I -- where do I begin? Judge,
23 first of all with respect to my letter to the Court, I do think
24 I can sit down with Mr. Teitelbaum. You will recall that I put
25 one other discovery dispute before this court which was the LPS

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1 deposition of Scott Walters and Mr. Walters is, in fact, coming
2 back tomorrow. We haven't had extensive discussions with his
3 counsel after the Court hearing on my letter describing the
4 discovery dispute. So I hope that you won't hear about that
5 discovery dispute anyway. I will sit down with Mr. Teitelbaum.

6 But I do -- I did write this letter because we have --
7 we may have an issue to put before the Court. It appears that
8 LPS is an intermediary between the attorney and the client here.
9 And as I heard Mr. Teitelbaum state in the notes, there's some
10 sort of summary of what counsel was saying which was then passed
11 on to the client through LPS. LPS is not the counsel here and
12 if they're summarizing notes of what the attorney is saying for
13 passing on to the client, then that might be an issue. The
14 element --

15 THE COURT: What do you mean that might be an issue?

16 MR. ZIPES: It might be an issue as to the overall
17 issues in this case which are how did we come up with bad -- a
18 motion that contained bad information, a motion to vacate the
19 stay filed by Chase which contained bad information? There
20 simply was indirect communication between the client the
21 principal here. It went through some third party.

22 Judge, as I said, I will sit down with Mr. Teitelbaum
23 to go over him notes. We may be able to come up with something.
24 But I will point out that one thing that wasn't in my letter is
25 in the operative document between Chase and LPS, there is a

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1 reference in these notes that you've been hearing about and
2 there's a reference in Article 5.5, which says that if there is
3 a discussion of legal matters, that should go outside the flow
4 of these notes. That's the way I read this. So that's another
5 reason why these notes from LPS, generated by LPS and LPS
6 employees shouldn't deal with attorney-client issues.

7 Again, Judge, we will sit down and we'll inform the
8 Court if we need further Court intervention on that but --

9 THE COURT: Okay. Pause please, Mr. Zipes.

10 MR. ZIPES: Okay.

11 THE COURT: Do you want to be heard and I take no
12 disrespect from this, on the issue as to whether my
13 understanding of the law -- of the role of agents who are
14 middlemen in attorney-client provisions is correct or not?

15 MR. ZIPES: Oh, Judge, the issue here, the -- we
16 discussed the Second Circuit case which is relevant here and it
17 came after the Novell (sic) case -- the Covell case which is the
18 Eckerd (ph.) case. And in that case, when the communication
19 between an attorney and a third party that doesn't prove -- that
20 doesn't help the attorney to interpret what the client's
21 position is, then that's not protected by the attorney-client
22 privilege. So there is an exception to that agency principle.

23 And here with LPS, LPS' role from what we understand
24 is simply as an intermediary. So we're wondering why a
25 communication from LPS should be subject to the attorney-client

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1 privilege. It's LPS -- it's an intermediary. And it's not
2 clear why that would be protected.

3 THE COURT: Well I understand that but that's fact
4 driven. Now if by way of example the lawyer says I want you to
5 tell your principal that my advice on X, Y or Z is the
6 following, it seems to me that's privileged. If it's on
7 something less than that, I've got to read it to see whether it
8 passes muster or not.

9 Now that's why I want you to have the dialogue with
10 Mr. Teitelbaum and if you and he don't have an agreement or if
11 you don't have enough information so you can say fine, I'm
12 satisfied, then Mr. Teitelbaum's to show me the document and I
13 will read it. And if I can't tell from reading it whether or
14 not the privilege applies, I will tell him that he's got to give
15 me an affidavit with a copy to you.

16 MR. ZIPES: Judge, that's completely acceptable. So
17 that will dispose of that issue hopefully and you won't hear
18 from us again on it, I don't think.

19 THE COURT: All right. Now --

20 MR. ZIPES: The other issue --

21 THE COURT: Yes, please.

22 MR. ZIPES: -- Judge, my office as we stated from the
23 beginning was concerned about this motion to vacate the stay
24 which contained improper, incorrect information of these
25 assignments, how they were produced. The purpose of the

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1 discovery from our office's point of view is to see if the
2 procedures have changed in coming up with this motion to vacate
3 the stay which was put before the Court, is flawed in some way
4 that requires sanctions or injunctive relief or some other
5 further relief from the Court. That's what the purpose of
6 discovery is.

7 We understand that the Debtor has counsel that
8 believes that there's a fraud on the Court and that may very
9 well be the case but we need to play out with discovery to see
10 what the discovery says. So to me when I was listening to this
11 deposition and the questions, if Ms. Charney believes that
12 there's a missing link here, that's Chase's burden. She could
13 have asked that question of Chase. It seems that the Chase
14 person was answering the questions in a way that was supporting
15 her theory and that she believes that there's missing documents
16 or that that something was creating after the fact. So that was
17 the purpose of the discovery and the deposition.

18 Judge, I am not going to -- my office was able to ask
19 its questions, so I am not -- I don't know that it's appropriate
20 for me to get too involved with that aspect of the discovery
21 dispute.

22 THE COURT: All right. Mr. Teitelbaum, anything
23 further before I rule?

24 MR. TEITELBAUM: Your Honor, just -- I don't know if
25 Your Honor -- I just -- I don't want to dignify with a response.

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1 I will just say Ms. Tirelli isn't overreacting, she is simply
2 not telling the truth about what happened.

3 MR. ZIPES: Just -- I'm sorry. Greg Zipes. I
4 apologize for interrupting Mr. Teitelbaum. On the issue -- on
5 that issue, I think it might be best that these depositions do
6 take place on neutral ground because there is a tension there.
7 I am -- it just might make sense. I offer my offices. We're
8 not exactly a neutral office in this case but I offer my offices
9 or we can rent a room somewhere but that really drives up costs
10 and doesn't really make a lot of sense. I offer my offices
11 though for any depositions.

12 THE COURT: All right. Mr. Teitelbaum?

13 MR. TEITELBAUM: Your Honor, I have no problem
14 conducting depositions at the UST's office. Mr. Zipes was
15 actually present at the end of the deposition. There was no --
16 again, I am not going to even dignify it. It's just not true.
17 Ms. Tirelli and I were standing -- each standing about three
18 feet apart and we were -- our voices were certainly raised and
19 tensions were high. That's it. You know, I will leave it at
20 that. There -- I will leave it at that.

21 The fact is that in response to -- and with respect to
22 LPS, we'll work with Mr. Zipes and I am confident that we'll be
23 able to resolve most, if not all of those issues. We'll get
24 with him immediately on that one.

25 With respect to the comments from Ms. Charney, what I

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1 was -- the reason I sort of chimed in prematurely was that I
2 heard Ms. Charney saying Mr. Reyes is a signer of one of the
3 assignments. He's not. He executed an affidavit in connection
4 with our supplemental pleading where he identified specific
5 documents.

6 But Your Honor may recall it's Scott Walter and Ann
7 Garvis that executed the assignments which are at issue. He did
8 not execute any documents in connection with this particular
9 loan, has no personal knowledge, not surprisingly, of this
10 particular loan. He was produced as a document custodian.

11 With respect to the balance of the issues under the
12 PSA, I just keep coming back to, Your Honor, Mr. Reyes testified
13 based upon the business records, very specifically, when the
14 documents were brought into the trust, what documents were
15 brought into the trust, when those documents actually left the
16 physical possession of the trustee to come to counsel in
17 connection with this litigation, when they were returned. Those
18 business records are uncontroverted, Your Honor. The other
19 business records that have been produced to date identified the
20 mortgage loan, even the trust including the documents testified
21 to by Mr. Herndon in his deposition, including the mortgage loan
22 purchase schedule identified by Mr. Herndon at his deposition,
23 Your Honor.

24 So simply the PSA here is an agreement among parties
25 to which Ms. Nuer is not a party to that agreement, has no

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1 interest in that agreement, not a third party beneficiary and
2 the real issue here is --

3 THE COURT: Well that is not by itself sufficient, Mr.
4 Teitelbaum. The issue is not whether or not she was named as a
5 third party beneficiary but whether she knows about it or not,
6 that document effects her rights in some way or even though it
7 may have been a broader document, it covers her.

8 Now that would seemingly be determined by what the
9 document says and by any exhibits to it, and by possibly any
10 other documents that are put together with it. I don't know
11 whether Reyes would have any knowledge about this or not but it
12 appeared to me upon my review of the transcript of this
13 deposition, that the wrong questions were asked but that's
14 subject to people's rights to be heard would be the way that I
15 would be legally analyzing it unless one of you guys showed me I
16 was in error in that regard.

17 MS. CHARNEY: Judge, this is Ms. Charney again and I
18 just wanted to make sure the Court understood, I consider a
19 signer to be someone who also signs these affidavits and so the
20 credibility or admissibility of Mr. Reyes' affidavit was in
21 front of me when I was taking the deposition.

22 THE COURT: But you were inquiring on some things that
23 were very far afield, such as an instance in which what may have
24 been a typographical error but maybe nothing more than that was
25 on a document that had a name looking an awful lot like his in a

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1 wholly different context.

2 MS. CHARNEY: Oh, well that was related only to -- and
3 this is because -- again, Judge, I appreciate that you don't
4 know me from Adam, but I come to this case with some background
5 in doing these depositions. And I am aware and I have documents
6 in front of me to question this man's credibility and
7 reliability. So the relevance of the question was to show that
8 he's -- you know, if I was to make a proffer it would be to show
9 the Court that he has executed documents on file in Clark
10 County, Nevada and with the FTC where he spells his name and
11 lists his position and many different aliases, not just one or
12 two. And I felt that that was appropriate to determine who my
13 deponent was and whether he was a credible, reliable witness and
14 that would go to very much whether his affidavit which does
15 relate directly to the pooling and servicing agreement, is
16 admissible evidence or whether it's fraud on the Court.

17 THE COURT: All right. Mr. Teitelbaum, you were
18 interrupted. Do you have anything further to say?

19 MR. TEITELBAUM: No. No, Your Honor. This is just
20 more to and fro. I think -- I honestly believe that the
21 transcript does speak for itself and that's why we did not
22 editorialize it.

23 THE COURT: All right. The transcript does speak for
24 itself. I'm ruling that Mr. Teitelbaum was substantially
25 justified in shutting down the deposition, not totally but

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1 substantially. I've already given you my ruling on the
2 resolution of Mr. Zipes' privilege issues.

3 Vis-a-vie the future of this, I think that this
4 deposition went dramatically off track and my view is that
5 because of its importance, I am not going to shut it down for
6 all time. I am ruling that any further deposition questioning
7 has to be done by Ms. Tirelli on behalf of the Debtor because I
8 am not sure if you still get it, Ms. Charney, in terms of my
9 rulings.

10 With the future of the deposition, I want both sides,
11 because I see you mainly as a bystander, Mr. Zipes -- that's not
12 to say you can't participate but I want both sides to read the
13 transcript of my earlier ruling. I thought Reyes was being
14 produced as a document custodian. And after 40 years, I have an
15 understanding of what I think a document custodian can testify
16 to. And he or she testifies as to the authenticity of any
17 signature, the authenticity of any document to the extent he
18 knows and because I don't want to be too restrictive in this,
19 his first hand knowledge of any document he signed, what he
20 thought he was doing or signing, why he was doing it or signing
21 it.

22 In addition, I will permit identifying a document of a
23 particular character and asking him whether he ever saw a
24 document of that character in connection with anything that
25 might affect Ms. Nuer, and if he has knowledge as to whether

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1 such documents are prepared in transactions that could have an
2 affect upon Ms. Nuer. I am once more saying that I am not
3 authorizing an examination into the mortgage servicing industry
4 across the United States and without more concerning the
5 truthfulness of Mr. Reyes in connection with this transaction, I
6 am not authorizing a free-standing inquiry into anything that
7 might be argued to bear upon his credibility in general. In
8 other words, I am authorizing impeachment but not on extrinsic
9 facts.

10 Now lastly, on any affidavit that Reyes signed in
11 connection with Ms. Nuer or this case, either on the litigation
12 front before me or in any state court proceedings or as a
13 predicate for any state court proceedings, he may be questioned
14 on material relating to his execution of that affidavit or any
15 facts that are set forth in that affidavit.

16 The further deposition will take place at Mr. Zipes'
17 office which he graciously agreed to make available and we're
18 going to do it again, folks, until we get it right.

19 MS. TIRELLI: Your Honor?

20 THE COURT: Who is speaking?

21 MS. TIRELLI: It's Linda Tirelli, I am sorry. I'm
22 sorry, did Your Honor finish?

23 THE COURT: Yes.

24 MS. TIRELLI: Did I interrupt?

25 THE COURT: No, you are okay. Go ahead.

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1 MS. TIRELLI: Okay. Thank you. With regard to this
2 future depositions, I do have other counsel assisting me now in
3 this case. And it would be important, I think, to just you know
4 help with my burden to have other attorneys doing the
5 questioning. I will be present at the deposition.

6 THE COURT: Well she can help you but I have read this
7 transcript, Ms. Tirelli, and I don't have confidence in this
8 deposition serving the interest of justice. Now, I mean I
9 didn't even talk about the five or six or eight questions
10 talking about who Mr. Teitelbaum was representing. That was
11 nonsense. He answered the question. I highlighted his answer
12 and then the questions go on, three, four, five times
13 thereafter.

14 MS. TIRELLI: Well, Your Honor, I have other attorneys
15 that are also helping me now in this case that I indicated to
16 Your Honor in January. If I felt I needed help, I would pull in
17 additional help as I am able. I do have attorney Max Gardner
18 (ph.) here from the North Carolina, who probably knows more
19 about LPS than anyone in the country and I think it would be
20 very useful to have him conduct the deposition tomorrow.

21 THE COURT: Well I am not saying that he can't
22 examine. I am simply saying I don't want Ms. Charney doing it.

23 MS. TIRELLI: Okay. Understood, Your Honor.

24 THE COURT: Now if you guys think that as a matter of
25 law she has the right to do it, you can give me a letter with

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1 some authority on it and obviously I will consider that. Now
2 have I gotten and granted a pro hac motion?

3 MS. TIRELLI: Yes, you have, Your Honor.

4 THE COURT: All right. Well she is certainly
5 authorized to speak on the phone and to write briefs and if you
6 think there is some law of which I was unaware that says that I
7 think -- that if I think a lawyer was not serving a client well
8 and was acting in a way where I had to grant a motion approving
9 the shutting down of a deposition, I will consider that.

10 MS. TIRELLI: Okay. Thank you, Your Honor.

11 THE COURT: We're adjourned, folks.

12 MS. TIRELLI: Thank you.

13 MR. TEITELBAUM: Thank you.

14 (This hearing concluded at 9:34:38 a.m.)

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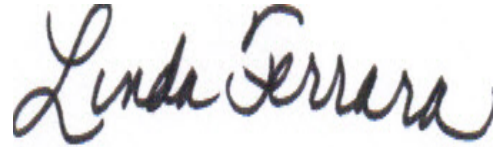
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CERTIFICATION

I, Linda Ferrara, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

Dated: April 19, 2010

A handwritten signature in blue ink that reads "Linda Ferrara". The signature is written in a cursive, flowing style.

Signature of Approved Transcriber